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COMPULSORY SERVICE IN OFFICE

IT was "the policy of prudent antiquity," as Lord COKE has said, "that officers did ever give a grace to the place, and not the place only grace (to) the officer."¹ A modern expression of a similar thought is found in the maxim, "the office should seek the man and not the man, the office." Have we Americans reversed the process? Have we lost sight of these ideals? Certain it is that some popular notions which are not consistent with the spirit of these maxims have grown up in this country. Offices have come to be regarded too much as prizes to be awarded to the favorite of the majority of the electors. Campaigns and elections are thought of as contests between individual office-seekers rather than earnest attempts on the part of citizens and voters to select competent men to serve the state.

These popular notions and conditions have had a direct influence been largely the result of the misuse of the power of appointment and of the attitude of the politician elected or appointed to office toward the office and its duties. For years politicians elected to office have used their official power of appointing the incumbents of lower offices largely as a means of rewarding their political friends. They have filled the offices under their control with their supporters and favorites and have little regarded the qualifications of the appointees for the offices. Public offices are looked upon by the average official as lucrative sinecures rather than opportunities for real public service. Personal or party advantage rather than patriotism or a desire to serve the state is too often the partisan politician's motive for accepting office. Where the officer cherishes ideals of this sort, the public's interests are bound to suffer.

It is not remarkable that the public, which sees so frequently this sort of official administration and hears even yet the politician's slogan, "to the victor belongs the spoils," so much oftener than any reference to the maxims above quoted, should have its notions as to the real nature of campaigns, elections and offices influenced thereby. As a natural result of this lowering of the popular ideals of public offices and officers the public has come to have less respect for the occupants of offices. Popular contempt for officials of the lower grade, especially in cities, is at least partially responsible for the refusal of respectable and efficient men to seek or accept election to such offices. Until very recently the existence of these con-

¹ Coke's Second Institute, 32.

ditions resulted in a lack of interest on the part of good citizens in the election of local officers. The feeling that a good administration from the public viewpoint could not be expected from any of the candidates for office induced in the voter carelessness in investigating and voting for candidates. Too frequent mal-administration in office has made the public over-suspicious, and as a consequence even the honest and fairly efficient local officer is frequently classed with those who are dishonest and inefficient. This lack of discrimination and too ready suspicion on the part of the public has driven many an honest and fairly efficient officer to return in disgust to private life.

These popular notions and conditions have had a direct influence local offices have been only only willingly accepted but much sought after by politicians. It is a very uncommon thing for one elected to office to refuse to take it. Either because the lower office is regarded as a stepping stone to some higher office, or from party loyalty or some more legitimate reason some men are usually ready to take any office. If the person chosen for the office refuses to take it there are nearly always some others who are desirous of the place.

These popular notions and conditions have had a direct influence on the decisions of some of the state courts respecting a state's right to compel one elected or appointed to public office to accept the same and perform the duties thereof. At a time when there is so much criticism of law and the courts in their interpretations of law because they are so far in arrears of the life and thought of the people, it is interesting to study the holdings of the various courts of our country on this question of the power of a state to compel acceptance and administration of office. If the writer is correct in the conclusions reached later in this article, those courts which have decided that acceptance of office is not compulsory in this country, furnish an exception to this principle of criticism. These decisions supply good examples of judicial interpretations influenced by popular notions and made without regard for logical reasoning from the common law and against the ultimate interests of the public.

The common law doctrine respecting offices was that the king had an interest in every subject and a right to his service and that consequently the officer could not refuse to serve except with the consent of the king or parliament.² As a corollary to this doctrine it was held that an officer who neglected a duty incumbent upon him,

² Comyn's Digest, *Title Officer*, 1 B; *Rex v. Larwood* (1694) 1 Salk. 168, 1 Ld. Ray. 380.

or one who, though chosen for an office, refused to serve therein had committed an offense against the king and was indictable therefor.³ Even municipal corporations at common law were entitled to the official services of their members and in addition to indicting the officer refusing to serve they were held to be able to impose, by by-law or ordinance, a pecuniary penalty upon any of their members who refused to serve in offices to which they had been duly chosen.⁴ In an English case, decided after the separation of the colonies from the mother country, it was held that a by-law of a municipal corporation imposing a fine on one who refused to accept office did not exempt one paying the fine from serving in the office, and a writ of mandamus might be issued to compel one to serve even after he had paid the fine imposed by the by-law.⁵ It is worthy of note that in practically all of the English cases on the right to compel an officer to serve, the offices in question were elective offices,⁶ and about the same in their nature and incidents as the elective public offices in this country. This general principle, that one chosen to office is obliged to serve therein and cannot resign at will, has been recognized quite universally in the United States as the doctrine of the common law.⁷

In civil matters, at least, the common law of England has been adopted as the basis of our jurisprudence, expressly or impliedly, by constitution, statute or interpretation, in practically all of the states except Louisiana.⁸ By this, of course, it is not meant that the common law as it existed in England prior to 1776 has been adopted bodily and is all enforced by the American courts. Only so much of it as was applicable to the circumstances and institutions of our people and not repugnant to our constitutions and statutes, became a part of the law of the land, and binding upon our courts. As was said by Mr. Justice Story in the opinion in *VanNess v. Pacard*,⁹ "The common law of England is not to be taken in all respects to be that of America. Our ancestors brought with them its general principles, and claimed it as their birthright; but they

³ *Queen v. Wyatt* (1705) 1 Salk. 380, 1 Ld. Ray. 1189; *King v. Lane* (1728) 2 Strange 920.

⁴ *City of London v. Vanacre* (1691) Holt 431.

⁵ *King v. Bower* (1823) 1 Barn. & C. 584.

⁶ See the English cases cited hereinbefore.

⁷ *Reiter v. State* (1894) 51 O. St. 74, 36 N. E. 934, 23 L. R. A. 681; *Edwards v. United States* (1880) 103 U. S. 471, 26 L. Ed. 314; *State v. Clayton* (1882) 27 Kan. 442, 41 Am. Rep. 418; *State v. Ferguson* (1864) 31 N. J. L. 107; *Hoke v. Henderson* (1833) 15 N. C. (4 Dev.) 1, 29; *State v. Murphy* (1908) 30 Nev. 409, 97 Pac. 391, 18 L. R. A. (N. S.) 1210.

⁸ *Bouvier Law Dictionary*, Vol. I, 371.

⁹ 2 Peters (U. S.) 137, 144, 7 L. Ed. 374.

brought with them and adopted only that portion which was applicable to their situation."

Our next inquiry should be, Is this principle of the common law, that the administration of an office is a duty which may be required of every citizen and which the citizen or subject cannot refuse and escape without the consent of the sovereign power, a part of the common law which was not adopted in this country because it was not in accord with American conditions and institutions? It should not be so considered. It is true that it has been said¹⁰ that those parts of the common law "which were applicable to subjects connected with political institutions and usages peculiar to the mother country and having no existence in the colonies, such for example as offices, dignities, advowsons, tithes, etc.," were meant to be excluded. But as the rule of compulsory service was applied to elective and non-hereditary local public offices of which the term was only one, or, at most, a few years, as well as to the higher hereditary offices carrying with them, as incidents, estates and high social position, it seems reasonable to conclude that there is nothing about the institution or the principle applied which makes it exotic in this country or its adoption here illogical. As intimated by MR. JUSTICE SHOPE in *People v. Williams*,¹¹ these minor English municipal offices seem to have been regarded as a burden and they probably furnished practically the only occasions for the application of the doctrine of compulsory service. The only incident which can be said to constitute any real distinguishing feature between the legal character of these old English minor municipal offices and public offices in this country is the officer's right of property in the office. Assuming that the officer's right of property in a public administrative office under the common law carried with it the full and absolute dominion which property in other things did, and this was certainly not true,¹² yet the duty of the person elected or appointed to office to accept and administer the same did not result from or depend upon this property right in an office. There was no property right in an office until the person accepted the office to which he was chosen. And if the property right came after acceptance and really originated in the acceptance how could it necessitate or be the origin of the doctrine that the person chosen to office must accept unless excused by the sovereign power? As has been stated,¹³ we must

¹⁰ Chancellor Bates in *Clawson v. Primrose* (1873) 4 Del. Chanc. 543, 666.

¹¹ (1893) 145 Ill. 573, 580, 33 N. E. 849, 24 L. R. A. 492, 36 A. S. R. 514.

¹² Comyn's Digest, Title Officer, B 5, B 6, K 2, 3, 4, 5, 6 and 7; *Hoke v. Henderson* (1833) 15 N. C. (4 Dev.) 1, 17, 18.

¹³ Pages 479-80 of this article.

look to the relation of the citizen or subject to the sovereign power rather than to the nature of public offices for the origin of the principle of compulsory service in office.

It cannot be said that the doctrine that the state has the right to demand the services of the individual citizen is opposed to the spirit of our institutions and to our general theories of government. In at least two public institutions, the army, and the jury, the service of citizens is compulsory. It is true that in both of the instances mentioned service has been made compulsory by statute. But statutes of this sort have been upheld as constitutional,¹⁴ which is a good indication that the principle of compulsory service is not opposed to the spirit of our institutions or our theories of government. In discussing the right of the government to force by a military draft a minor citizen to do military service, JUDGE BUTLER in *Lanahan v. Birge*,¹⁵ said, "It is a fundamental principle of national law, essential to national life, that every citizen, whether of age to make contracts generally or not, is under obligation to serve and defend the constituted authorities of the state and nation, and for that purpose to bear arms, when of sufficient age and capacity to do so, and when such service is lawfully required of him. The power to enforce that obligation, so far as the necessities of the state may require, is an incident of state sovereignty and the subject of state constitutional and statutory regulation." Isn't it just as necessary that the state shall have capable administrative officers as that it shall have physically fit soldiers? Does the fact that there are generally plenty of citizens ready to accept office take away the state's power to compel its citizens to serve if the need appears? The state generally can and does raise its army by voluntary enlistment, but the power to compel service by military draft remains and may be exercised by the state whenever it wishes. From the foregoing it seems but reasonable to conclude that the principle of compulsory service in office is not in any measure discordant with our institutions and the general principles of the republican form of government.

Many of the courts which refuse to enforce this common law principle offer as the reason for their refusal, not that the doctrine is incongruous with the nature of public offices in this country or with our general theories of the duty of citizens to the state, but that the people, in the constitution, or the legislature, in the laws of the state, have evinced, expressly or impliedly, the intention to

¹⁴ *Kneedler v. Lane* (1863) 45 Pa. St. 238.

¹⁵ (1862) 30 Conn. 438, 443.

abrogate this principle.¹⁶ One of the common statutory provisions which is frequently held to indicate the legislative intent to annul this principle of the common law provides that every office shall become vacant on the happening of any one of the following events before the expiration of the term of office,—the death of the incumbent, his resignation, his removal from office, etc.¹⁷ Whether the conclusion that such a statute has the effect of annulling the common law is correct depends on the meaning placed on the word “resignation.” If it is given the meaning of relinquish, then it seems that the conclusion is correct, for if an officer can lay down his office whenever he desires without the consent of the state he can refuse to take the office at the start. But if the word, “resignation,” is regarded as including both an offer to relinquish and an acceptance of the offer, then statutory provisions like that referred to, mean no more than that a resignation tendered and accepted vacates the office. This is not opposed to the common law principle of compulsory service. It seems reasonable to say that the latter meaning of the word is the one that the legislature intended. Under the common law a vacancy was created by *surrender* of the office and the term “surrender” included both the offer on the part of the incumbent to relinquish and the acceptance thereof on the part of the king, either personally or by some officer or body which represented him.¹⁸ The last above mentioned interpretation of “resignation” is also encouraged by most of those courts which hold that an officer’s resignation does not take effect until accepted, for in the most of the states there is a statute similar to the one cited.¹⁹

Some courts have argued that a statute imposing a fine on a person for neglecting or refusing to serve in office, recognizes “the power, if not the right, of a citizen to refuse to hold office.”²⁰ Perhaps the best answer to such an argument is to say, as the English courts have said in such a case, that as the common law makes it an offense to refuse to serve when elected to an office and the statute

¹⁶ *State v. Bus* (1896) 135 Mo. 325, 36 S. W. 636, 33 L. R. A. 616; *Olmsted v. Dennis* (1879) 77 N. Y. 378; *Reiter v. State* (1894) 51 O. St. 74, 36 N. E. 943, 23 L. R. A. 681; *United States v. Justices of Lauderdale County* (1882) 10 Fed. 460; *State v. Murphy* (1908) 30 Nev. 409, 97 Pac. 591, 18 L. R. A. (N. S.) 1210.

¹⁷ *Gilbert v. Luce* (1851) 11 Barb. 91; *State v. Murphy* (1908) 30 Nev. 409, 97 Pac. 391, 18 L. R. A. (N. S.) 1210; *Reiter v. State* (1894) 51 O. St. 74, 36 N. E. 943, 23 L. R. A. 681.

¹⁸ *Comyn's Digest*, Title Officer, K 9, Title Patent, G.

¹⁹ *Rogers v. Slonaker* (1884) 32 Kan. 191, 4 Pac. 138; *State v. Clayton* (1882) 27 Kan. 442, 41 Am. Rep. 418; *Clark v. Board of Education* (1897) 112 Mich. 656, 71 N. W. 177; *Edwards v. United States* (1880) 103 U. S. 471, 26 L. Ed. 314; *State v. Superior Court for Kitsap County* (1907) 46 Wash. 616, 91 Pac. 4, 12 L. R. A. (N. S.) 1010.

²⁰ *Reiter v. State* (1894) 51 O. St. 74, 36 N. E. 934, 23 L. R. A. 681.

does not indicate that the payment of the fine is to exempt the party paying the same from serving in the office or that the payment is to be taken in lieu of service, there is no reason why the court should say that the payment should have any such operation.²¹ The English courts hold that one elected to an office can be compelled by mandamus to serve, even after he has paid a fine, fixed by a by-law of the city, for refusal to serve.²² Ordinarily a statute which fixes a penalty for a certain act is not considered as recognizing the right of the person paying the penalty to continue doing the same act. The law looks upon a fine as a deterrent rather than a license fee paid for the privilege of acting contrary to the statute. Why should we apply a different principle to an ordinance fixing a penalty for refusal to take office? The refusal is a continuing breach of the statute. Generally the levy of the penalty will be enough to induce the recalcitrant citizen to serve, but if that fails it is the reasonable and logical course to allow mandamus to compel the citizen to do his duty.

Another statute that is considered by some courts to indicate a legislative refusal to recognize the principle of compulsory service is one declaring that upon certain contingencies, as for example the failure of the person elected or appointed to office to file a bond, or to transmit a certificate that he has taken oath, within a specified time, the office shall become vacant. It is sufficient to say that such statutes are quite generally treated by the courts as directory rather than mandatory.²³ Under such laws the default is generally treated as only a ground for forfeiture and not a forfeiture ipso facto, and if the sovereign power, the state, sees fit to excuse the delinquency by granting a commission, there is no vacancy.²⁴ The object of statutes of this sort is to secure a prompt performance of the acts preliminary to taking office. This aim is supposedly accomplished by placing in the hands of the state the power to declare a forfeiture if the proper steps are not taken by the claimant of the office. There is nothing in such laws to indicate a legislative intent to allow the person elected or appointed to an office to escape service therein

²¹ *King v. Bower* (1823) 1 Barn. & C. 584.

²² *King v. Bower* (1823) 1 Barn. & C. 584.

²³ *City of Chicago v. Gage* (1880) 95 Ill. 593, 35 Am. Rep. 182; *State v. Churchill* (1867) 41 Mo. 41; *Pickering v. Day* (1866) 2 Del. Chancery 333; *Throop, Public Officers*, § 173; *Mechem, Public Officers*, §§ 265, 266; *Schuff v. Pflanze* (1896) 99 Ky. 97, 35 S. W. 132.

²⁴ *City of Chicago v. Gage* (1880) 95 Ill. 593; *State v. Carroll* (1910) 57 Wash. 202, 106 Pac. 748; *People v. Benfield* (1890) 80 Mich. 265, 45 N. W. 135; *Throop, Public Officers*, § 173; *Mechem, Public Officers*, §§ 265, 266; *Brown v. Grover* (1869) 6 Bush (Ky.) 1.

by refusing to take the proper preliminary steps. If such person refuses to serve, he should be compelled by mandamus to do so.

Other statutes of the same general nature as the foregoing have been regarded by the courts as abrogating the common law principle of compulsory service.²⁵ To refer to all of them would expand unnecessarily the length of this article. Practically all of them can be shown to be not in conflict with the common law when they are looked at historically and their object is considered. There are, however, two or three peculiar statutory or constitutional provisions which it may be well to mention here. The constitution of Missouri adopted in 1875 provides,²⁶ "In the absence of any contrary provision, all officers now or hereafter elected or appointed, subject to the right of resignation, shall hold office during their official terms, and until their successors shall be duly elected and qualified." This is simply a repetition of section eight of article two of the constitution of 1865, with the addition of the words "subject to the right of resignation," which were inserted in the constitution in 1875. It is impossible, of course, to know certainly the purpose of the constitutional convention in inserting these words. The Missouri court has held that the intent was to recognize an officer's right to resign at will and hence that the clause abrogates the common law principle of compulsory service.²⁷ The probabilities are that the provision was placed in the constitution of 1865 in order to authorize officers to hold over after the expiration of their terms and until the election and qualification of their successors, as they would not be obliged or entitled to do without such a provision in constitution or statute,²⁸ so that the offices would at no time be without incumbents. The exception placed in the constitution of 1875 might reasonably have been inserted, not with the intent to recognize the right of the officer to relinquish his office at will without the consent of the state, but rather for the purpose of exempting the officer who should resign and whose resignation should be accepted, from serving until his successor should be appointed and qualify. The doctrine that the holdover clause makes it impossible for an officer to escape from service, even though his resignation be accepted, until his successor is chosen and qualified, was first enunciated in this country in February, 1875, by a federal court sitting in Illinois.²⁹

²⁵ *Reiter v. State* (1894) 51 O. St. 74, 36 N. E. 943, 23 L. R. A. 681.

²⁶ § 5, Art. 14.

²⁷ *State v. Bus* (1896) 135 Mo. 325, 36 S. W. 636, 33 L. R. A. 616.

²⁸ *State v. Perkins* (1897) 139 Mo. 106, 114; *Mechem, Public Officers*, § 396.

²⁹ *United States v. Badger* (Feb. 1875) 6 Biss. 308, later affirmed in 93 U. S. 599. See also *Keen v. Featherston* (1902) 29 Tex. Civ. App. 563, 69 S. W. 983; *Jones v. City of Jefferson* (1886) 66 Tex. 576.

This fact seems to entitle to more credence than mere speculation the above mentioned suggestion, for it is not unlikely that the decision came to the notice of some of the lawyers who were delegates to the convention, which lasted until August 2, 1875. There can be no doubt that the people have the right and power, either themselves or through their legislature, to abrogate the common law. Yet when one explanation of intent is as reasonable and satisfactory as another, that interpretation should be adopted which upholds as a part of the state law the wise common law principle of compulsory service.

An Ohio statute provided that "The resignation of a senator or representative which is tendered during any session of the general assembly, shall not take effect until the branch of which the person tendering it is a member has accepted the same by a vote of a majority of the members elected to such branch exclusive of the person tendering his resignation." In *Reiter v. State*³⁰ the Ohio court held that the legislature by this statute recognized the law of the state to be that but for such provision the resignation would take effect without acceptance. The statute was in the form above quoted until April 5, 1893, almost a year before the decision in the case mentioned, when it was amended by adding to it the following provisions, "but a member of either branch of the assembly may resign, at any other time, to the governor, who shall have power to accept the same. That this provision shall not apply to a member-elect of the general assembly offering his resignation previous to the organization of the general assembly to which he has been elected."³¹ The amendment really furnishes the explanation of the legislative intent in this statute. The purpose of the statute as it stood before 1893 was stated in the title thereto to be "to preserve the constitutional quorum of the general assembly." In the absence of any express statutory provision as to whom resignations are to be made, the general rule is that they are to be made to the officer who has the power to appoint, or to call an election to select, a successor.³² At the time of the passage of this act the power to call an election to fill a vacancy in the office of state senator or representative rested in the governor.³³ By the operation of the rule just stated resignations were made to the governor. This placed in the hands of the governor the power to accept the resignations of

³⁰ (1894) 51 O. St. 74, 36 N. E. 934, 23 L. R. A. 681.

³¹ Bates Ann. Stat. of Ohio, Title II, Chap. I, § 37.

³² *State ex rel. Sawyer v. Pollner* (1899) 18 O. C. C. 304, 309. See also *Mechem, Public Officers*, § 413.

³³ Stat. of Ohio (1841) Chap. 43, § 30.

enough of the members of either house of the general assembly to make it impossible for the house to secure a quorum. In order to prevent a possible interference in this way with its business, the assembly passed the law above quoted. There was no need for the rule to be applied after the assembly adjourned because no injury then could be done by the acceptance of resignations by the governor, and so it seems reasonable to say that the amendment of 1893, which was declaratory of the common law, was passed in order to prevent any implication of the abrogation thereof by the act as it originally stood. That this is a correct interpretation of the legislative intent, and that the general assembly did not recognize the law of the state to be that in the absence of any express provision to the contrary an officer may resign at will, is indicated by the last sentence of the amendment, which provides, "That this provision (referring to the provision allowing the governor to accept the resignation of an assemblyman when the general assembly is not in session) shall not apply to a member-elect of the general assembly offering his resignation previous to the organization of the general assembly to which he has been elected." The evident purpose of this clause was to keep assemblymen from resigning between the time of their election and the meeting of the assembly. But if in the absence of express statutory provision the law in Ohio be recognized to be that the officer may resign at will, then the latter clause is useless for the purpose suggested, because it would result in placing less restraint on resignations than if it had been omitted, and this result was evidently not the one intended. It is a rule of statutory construction that courts are not at liberty to disregard any part of a statute but must give every part some meaning which shall consist with reason and common sense,³⁴ and the construction of each part must, if possible, be in harmony with the general purpose of the enactment.³⁵ It is quite impossible to follow this rule of construction and reach any other conclusion than that above, as to the meaning of the statute in question, or the intent of the legislators in passing it.

A statute of Nevada provides as follows: "Any person who shall receive a commission, or a certificate of election or appointment, shall be at liberty to resign such office, though he may not have entered upon the execution of its duties or taken the requisite oath

³⁴ *State v. Turnpike Company* (1865) 16 O. St. 308, 320; *Sutherland's Statutory Construction*, § 240.

³⁵ *Converse v. United States* (1858) 21 How. 463, 467; *Sutherland's Statutory Construction*, § 240.

of office."³⁶ The Nevada courts have held this statute to empower an officer to resign at will,³⁷ and hence to refuse to recognize the right of the state to compel service in office. As suggested by the counsel for the petitioner in the case of *State v. Murphy*,³⁸ it is probable that this provision was intended, not to do away with the necessity of acceptance of a resignation to make it effective and hence with the rule of compulsory service in office, but to abrogate "the common law rule that an office could not be resigned in any manner until it was actually occupied," which was decided, in 1864, to be the rule in California.³⁹ The Nevada statute in question was passed less than two years later, and it is very reasonable to suppose that the territorial legislature enacted this statute to forestall the courts of the territory from ever laying down for Nevada the rule which the California courts had adopted.

The conclusion from the foregoing is that the principle of compulsory service is not opposed to the spirit of our government or the nature of our institutions; that it therefore became a part of the law of the various states on the adoption of the common law; and that few, if any, of the statutory or constitutional provisions of the various states really show a legislative intent to abrogate the principle.

As has been intimated⁴¹ the various courts of this country are not agreed on the question of compulsory service in office. In only one case in the United States has the question whether a citizen chosen to an office can be compelled to accept and administer it been squarely raised, and in that case the court decided the question in the affirmative.⁴² The cases on the question of the right of an officer to resign, however, are directly in point, as there is nothing in the nature of a contract between the officer and the state and the only basis for the refusal to allow an officer to resign at will without the necessity of an acceptance is the legal duty which a citizen owes to the state to serve it in the civil capacity of an officer unless excused therefrom.⁴³ It is therefore proper to count as in favor of

³⁶ Compiled Laws of Nevada, § 1814.

³⁷ *State v. Murphy* (1908) 30 Nev. 409, 97 Pac. 391, 18 L. R. A. (N. S.) 1210.

³⁸ 30 Nev. 416.

³⁹ *Miller v. Sacramento* (April, 1864) 25 Cal. 93. See also *People v. Ward* (1895) 107 Cal. 236, where the doctrine was reaffirmed.

⁴⁰ March 9, 1866.

⁴¹ Page 479 of this article.

⁴² *People v. Williams* (1893) 145 Ill. 573, 33 N. E. 849, 24 L. R. A. 492, 36 A. S. R. 514.

⁴³ *State v. Ferguson* (1864) 31 N. J. L. 107, 122; *State v. Murphy* (1908) 30 Nev. 409, 424, 97 Pac. 391, 18 L. R. A. (N. S.) 1210.

the rule of compulsory service all those states which recognize the doctrine that a resignation does not take effect so as to excuse from service the officer tendering it until it is accepted by the state. On this basis nine states—*Illinois*,⁴⁴ *South Carolina*,⁴⁵ *Kansas*,⁴⁶ *Washington*,⁴⁷ *Michigan*,⁴⁸ *North Carolina*,⁴⁹ *Virginia*,⁵⁰ *New Jersey*,⁵¹ and *Texas*⁵²—perhaps four others—*Kentucky*,⁵³ *Georgia*,⁵⁴ *Tennessee*,⁵⁵ and *New Hampshire*⁵⁶—and the territory of *Alaska*,⁵⁷ favor the rule of compulsory service. Counting as against the rule

⁴⁴ *People v. Williams* (1893) 145 Ill. 573, 33 N. E. 849, 24 L. R. A. 492, 36 A. S. R. 514.

⁴⁵ *State ex rel. Jernigan v. Stickley* (1908) 80 S. C. 64, 61 S. E. 211.

⁴⁶ *State v. Clayton* (1882) 27 Kan. 442, 41 Am. Rep. 418; *Rogers v. Slonaker* (1884) 32 Kan. 191, 4 Pac. 138.

⁴⁷ *State v. Superior Court of Kitsap County* (1907) 46 Wash. 616, 91 Pac. 4, 12 L. R. A. (N. S.) 1010.

⁴⁸ *Clark v. Board of Education* (1897) 112 Mich. 656, 71 N. W. 177; *Edwards v. United States* (1880) 103 U. S. 471, 26 L. Ed. 314.

⁴⁹ *Hoke v. Henderson* (1833) 15 N. C. (4 Dev.) 1, 29.

⁵⁰ *Coleman v. Sands* (1901) 87 Va. 689, 13 S. E. 148. (Virtually overruling the case of *Bunting v. Willis* (1876) 27 Gratt. 144, which is so often cited as sustaining the proposition that an officer can resign at will; the court in the latter case regarded the principle that an acceptance is not necessary to give effect to a resignation as set forth in *Bunting v. Willis* as unnecessary to the decision in that case, and distinguished between the two cases on the ground that in the case at bar the office concerned was a local one while in *Bunting v. Willis* a federal office was under discussion.)

⁵¹ *State v. Ferguson* (1864) 31 N. J. L. 107.

⁵² *McGhee v. Dickey* (1893) 4 Tex. Civ. App. 104; *Jones v. City of Jefferson* (1886) 66 Tex. 576. (The decision in the later of these cases is based on a statute requiring the resignation of a city officer to be accepted.)

⁵³ *Patrick v. Hagins* (1897) 19 Ky. Law Rep. 482, 41 S. W. 31. (The question in this case arose under a statute providing for filling a vacancy by election at the next succeeding annual election if three months intervene between the happening of vacancy and the time of election, and it was held that a petition alleging that the incumbent of an office "resigned" at a certain date, three months before the next annual election, did not show that a vacancy had then occurred as there was no allegation of the acceptance of the resignation at that time.) See also *Saunders v. O'Bannon* (1905) 27 Ky. Law Rep. 1166, 87 S. W. 1105, holding that a prospective resignation cannot be withdrawn after acceptance but before the date specified for it to take effect.

⁵⁴ *City Council v. Yoamans* (1890) 85 Ga. 708. (The decision in this case is largely, if not wholly, based on the hold-over provision of a city charter; in the lower court, however, the position was taken that an acceptance is necessary to make a resignation effective and the Supreme Court, while holding that it was unnecessary to rule expressly on this point, expressed the belief that the ruling of the trial judge was "in line with the main current of authority.")

⁵⁵ *Murray v. State* (1905) 115 Tenn. 303, 89 S. W. 101. (Holding that a prospective resignation cannot be withdrawn before the date fixed for it to take effect, if it has been accepted before attempt is made to withdraw it. The court placed emphasis on the acceptance as putting the resignation beyond the power of the officer to withdraw.)

⁵⁶ *Attorney General v. Taggart* (1890) 66 N. H. 367, 371. (The question of the necessity of an acceptance was not necessary to the decision here and the court leaves the answer a little in doubt, but it announces in no uncertain terms the state's right to the services of its citizens in civil affairs.) See also *Bowles v. Landaff* (1879) 59 N. H. 164, 191.

⁵⁷ *Town of Nome v. Rice* (1908) 3 Alaska 602.

all those states which do not require an acceptance to make a resignation effective, eight states — *Ohio*,⁵⁸ *California*,⁵⁹ *Iowa*,⁶⁰ *Alabama*,⁶¹ *Missouri*,⁶² *Nebraska*,⁶³ *Indiana*,⁶⁴ and *Nevada*,⁶⁵ and perhaps *New York*⁶⁶ — and the Circuit Court of the United States for the Seventh Circuit,⁶⁷ refuse to recognize the principle of compulsory service. In three of the last named jurisdictions, California, Iowa and the United States Circuit Court, the discussion of the necessity of acceptance to make the resignation effective was not essential to the decision as there was some act amounting to an acceptance in each case.⁶⁸ The courts in three other of these jurisdictions, Ohio, Nevada and Missouri, base their holdings on statutory or constitutional provisions, which, if the writer's conclusions heretofore set forth⁶⁹ are correct, do not warrant the courts' determinations. The court in at least one of the remaining jurisdictions, Nebraska,⁷⁰ depended for authority largely on the case of *United States v. Wright*,⁷¹ decided in the Circuit Court of the United States for the Seventh Circuit. This case cannot be logically used as an authority in a case where a state office is concerned, because the courts must depend upon the common law for the rule

⁵⁸ *Reiter v. State* (1894) 51 O. St. 74, 36 N. E. 943, 23 L. R. A. 681.

⁵⁹ *People v. Porter* (1856) 6 Cal. 27. (Decided by a divided court.)

⁶⁰ *Gates v. Delaware County* (1861) 12 Iowa 405.

⁶¹ *State v. Fowler* (1909) 160 Ala. 186, 48 So. 985; *State v. Fitts* (1873) 49 Ala. 402.

⁶² *State v. Bus* (1896) 135 Mo. 325, 36 S. W. 636, 33 L. R. A. 610.

⁶³ *State v. Lincoln* (1876) 4 Neb. 260.

⁶⁴ *State v. Hauss* (1873) 43 Ind. 105. (This case holds that an unconditional resignation to take effect immediately, sent to and received by the proper representative of the state, cannot be withdrawn even though not accepted; it does not discuss the necessity of acceptance to make the resignation effective, but the result reached in the case seems irreconcilable with any other principle than that acceptance is not necessary to give effect to a resignation.) See *Leech v. State* (1881) 78 Ind. 570, where though unnecessary to the decision the court said, "the modern doctrine seems to be that an officer has the absolute right to resign, and that his resignation, placed in the hands of the proper officer or body, vacates the office without an acceptance of the resignation." Some doubt is cast on this as the doctrine of Indiana by the earlier case of *Biddle v. Willard* (1857) 10 Ind. 62, in which it was held that a prospective resignation may be withdrawn at any time before it is accepted and after it is accepted, it may be withdrawn with the consent of the authority accepting. And see further *McGee v. State* (1885) 103 Ind. 444, 3 N. E. 139 and *State v. Huff* (1909) 172 Ind. 1, 87 N. E. 141, in which some importance seems to be attached to the acceptance of the resignation.

⁶⁵ *State v. Clarke* (1868) 3 Nev. 566; *State v. Beek* (1892) 24 Nev. 92; *State v. Murphy* (1908) 30 Nev. 409, 97 Pac. 391, 18 L. R. A. (N. S.) 1210. (The last case was decided by a divided court.)

⁶⁶ *Gilbert v. Luce* (1851) 11 Barb. 91; *Olmsted v. Dennis* (1879) 77 N. Y. 378, 387.

⁶⁷ *United States v. Wright* (1839) 1 McLean 509.

⁶⁸ *Gates v. Delaware County* (1861) 12 Iowa 405; *United States v. Wright* (1839) 1 McLean 509; *People v. Porter* (1856) 6 Cal. 27.

⁶⁹ See pages 482-4 of this article.

⁷⁰ *State v. Lincoln* (1876) 4 Neb. 260.

⁷¹ 1 McLean 509.

of compulsory service, unless the rule has been expressly enacted in the jurisdiction, and the common law has never been adopted by the United States as a distinct sovereignty.⁷² Therefore even if the federal courts hold respecting a federal officer that acceptance is not necessary to make a resignation effective, or that a citizen of the United States cannot be compelled to accept a federal office and to serve therein, as they seem inclined to hold,⁷³ they should not be followed as authority by the courts of the various states, where the common law has been adopted, in dealing with state offices, though this rule should not be observed when a state court is dealing with a federal office.⁷⁴

The real reason present in the minds of the judges who have found against the principle of compulsory service is, as the writer believes, that the rule conflicts with the popular individualistic conception of office and official service—the notion that every voter should have an opportunity to seek office, but that no one should be compelled to take office if he does not wish to do so. Many men feel that they should not be asked to take office if the salary attached to the office is not equal to the financial return they are able to get in private employment. They feel they should be called upon to serve the state only when the money return to them is as great or greater than they can get elsewhere for the same services. MR. CHIEF JUSTICE LOWE of the Iowa Supreme Court, in *Gates v. Delaware County*,⁷⁵ said, "The right to lay down office in this country is so clear and universally acknowledged, that it may well be questioned whether the officer appointed to take such resignation would have the right to prevent it. Certainly no such power is given him in the law. It is true in particular cases, or under special circumstances, he might with propriety advise against it, but he has no absolute legal right to peremptorily forbid the act, or refuse the resignation. Such is not the language, the spirit, nor the policy of the law." The Chief Justice cites not a single case to support his statement of the law. It is true there was at the time of this decision but one decided case in this country which held that acceptance was necessary to give effect to a resignation.⁷⁶ But the

⁷² Bouvier Law Dictionary, Vol. I, p. 372; *Swift v. Philadelphia, etc. R. R. Co.* (1894) 64 Fed. 59; *Wharton v. Peters* (1834) 8 Pet. 591, 658; *United States v. Hudson et al.* (1812) 7 Cranch 32; *Gatton v. Ry. Co.* (1895) 95 Iowa 112.

⁷³ *United States v. Deitrich* (1904) 126 Fed. 676.

⁷⁴ *Bunting v. Willis* (1876) 27 Gratt. 144; and see *Coleman v. Sands* (1901) 87 Va. 689, 13 S. E. 148, for comment on this distinction.

⁷⁵ (1861) 12 Iowa 405, 407-8.

⁷⁶ *Hoke v. Henderson* (1833) 15 N. C. (4 Dev.) 1.

common law had been recognized frequently theretofore to be in force in Iowa⁷⁷ even by Chief Justice LOWE himself,⁷⁸ and it is directly opposed to the principles stated in deciding this case.

In refusing to follow the common law rule MR. JUSTICE SWEENEY, in *State v. Murphy*,⁷⁹ stated that even without the statutory provisions of his state, which, he argued, changed the common law, he would hesitate to follow its principles. "The suggestion," said he, "that a civil officer in this country may be compelled against his will to hold an office, and that he is liable commonly for refusal so to do, is not in accord with prevailing American ideas of liberty of action." Later in the opinion he conceded that if a public office be regarded as a public burden, which it is the duty of every good citizen to bear for the public benefit and which he may be compelled to assume, it necessarily results that one who has taken up the burden cannot lay it down at his own pleasure. Could anything less than an explicit statement make it more apparent than this that the Justice was influenced by the popular ideals and conceptions of the nature of an office and the relation a citizen bears to the state?

Many other quotations from the opinions of courts might be offered to support the writer's opinion, but it seems unnecessary to do so. Perhaps it should be expected that judges, who must have mingled and worked with politicians and perhaps have become politicians themselves in order to reach the elevation of the bench, will retain the politician's views and ideas of office and duties of citizenship after they have reached that eminence. If so, it is a sad commentary on our method of selecting the state judiciary.

After reading quotations like these it is refreshing to one who has high ideals of citizenship to note the expression of MR. JUSTICE SHORE in his opinion in *People v. Williams*,⁸⁰ where he said, "Under our form of government the principle (*i. e.* that the sovereign has an interest in the subject and a right to his service) applies with even greater force than under a monarchy. In a republic the power rests in the people, to be expressed only in the forms of law. And if the duty, preservative of the common welfare, is disregarded, society may suffer great inconvenience and loss, before, through the methods of legislation, the evil can be corrected. Upon a refusal of officers to perform their functions, effective govern-

⁷⁷ *State v. Twogood* (1858) 7 Iowa 252; *Wagner v. Bissell* (1856) 3 Iowa 395, 402; *Holmes, Brown & Co. v. Mallett* (1840) 1 Morris 82; *O'Ferrall v. Simplot* (1857) 4 Iowa 381.

⁷⁸ *Estes v. Carter* (1860) 10 Iowa 400.

⁷⁹ 30 Nev. 409, 424.

⁸⁰ 145 Ill. 573, 582-3.

ment, *pro tanto*, ceases. All citizens owe the duty of aiding in carrying on the civil departments of government. In civilized and enlightened society men are not absolutely free. The burden of government must be borne as a contribution by the citizen in return for the protection afforded. The sovereign, subject only to self-imposed restrictions and limitations, may, in right of eminent domain, take the property of the citizen for public use. He is required to serve on juries, to attend as witness, and without compensation, is required to join the *posse comitatus* at the command of the representative of the sovereign power. He may be required to do military services at the will of the sovereign power. These are examples where private right and convenience must yield to the public welfare and necessity. It is essential to the public welfare, necessary to the preservation of government, that public affairs be properly administered; and for this purpose civil officers are chosen, and their duties prescribed by law. A political organization must necessarily be defective, which provides no adequate means to compel the observance of the obvious duty of the citizen, chosen to office, to enter upon and discharge the public duty imposed by its laws, and necessary to the exercise of the functions of government."

Equally gratifying are the words of Mr. CHIEF JUSTICE RUFFIN in the opinion in the early case of *Hoke v. Henderson*,⁸¹ "The public has a right to the services of all the citizens, and may demand them in all civil departments as well as in the military. * * * I cannot doubt that the Legislature has the perfect power, if it choose arbitrarily to exercise it, of compelling, not indeed a particular man designated in the statute by name, but any citizen elected or appointed, as by law prescribed, to serve in office even against his will."⁸²

In these latter expressions the justices were in advance of the popular notions of their times. For in 1893, the date of the latest of these utterances, the great body of the people did not recognize public service as a duty to be performed at the expense of personal sacrifice, and it may well be doubted whether a majority of them do even to-day. The results in these cases were reached by reasoning

⁸¹ (1833) 15 N. C. (4 Dev.) 1, 29.

⁸² See also *State v. Clayton* (1882) 27 Kan. 442, 444, where it is said, "The public have the right to command the services of any citizen in any official position which they may designate; and he may not after entering upon the duties of the position, abandon them at his option. It is true that this as a practical question will seldom arise, and is of little moment; for in this country there are so many willing and eager to serve the public in official positions that the difficulty will always be to find offices for the aspirants rather than to find incumbents for the offices. Still emergencies may arise in which the absolute and superior right of the public must be recognized."

logically from the common law and with no regard to popular notions or ideals. The writer has no quarrel with those who criticise the courts for not giving more heed to the life, thought and ideals of the people. He simply desires to point the warning that even in following popular ideals there is danger that vicious results will be reached.

It is to be hoped that the courts of this country will all eventually come to recognize and apply the rule of compulsory service as it is now recognized and applied in a majority of those jurisdictions which have had occasion to consider the question. The practical advantages of a uniform rule of this sort are many and manifest. Not the least of the good results from a general adoption and frequent application of such a rule would be higher ideals of public service and consequent thereon a relatively more efficient administration of the public business. As we advance in citizenship it may be that the rule will be applied to force some citizens of recognized ability, whom their neighbors have elected to office against their will, to take the offices and perform the duties thereto. The advisability of such a course, should the situation ever arise, is not necessarily questionable. Often, under our present jury system, the man who serves under protest makes the best juror. Is it not possible that the same thing will be true of an administrative officer?

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